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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN CYANAMID COMPANY,
Petitioner,

—against—

MELAMINE CHEMICALS, INC. *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Where the parties to an 18-year-old consent decree ask that the decree be vacated because basic changes in industry conditions have made it obsolete and anticompetitive, and the district court so finds:

(a) Must the parties make any further showing in order to obtain relief from the decree?

(b) More specifically, under those circumstances, must the court adjudicate liability issues underlying the original complaint in the case before deciding whether the motion to vacate the decree should be granted?

PARTIES TO THE PROCEEDING

The petitioner herein is the American Cyanamid Company ("Cyanamid"), the defendant in the original case, *United States* v. *American Cyanamid Company*, 60 Civ. 3857 (S.D.N.Y.).* Respondent Melamine Chemicals, Inc. ("MCI"), a company jointly owned by Ashland Oil, Inc. and First Mississippi Corporation, was not a party to the original action or the 1964 consent judgment, but was allowed to intervene in 1982 to oppose termination of the judgment. Another company, Dart Industries, Inc. ("Dart"), was also permitted to intervene in the district court but did not participate in the appeal. The United States of America was the plaintiff in the case, and is made a respondent herein pursuant to this Court's Rule 19.6.

* Pursuant to this Court's Rule 28.1, the following are non-wholly-owned subsidiaries or affiliates of Cyanamid:

Arizona Chemical Company; B. Braun-Dexon G.m.b.H.; Brewster Phosphates (a partnership); Cyanamid Fothergill Limited; Cyanamid Iberica, S.A.; Cyanamid India Limited; Cyanamid Italia S.p.A.; Cyanamid-Ketjen Katalysator B.V.; Cyanamid (Pakistan) Limited; CYRO Industries (a partnership); Cyanamid Portugal Limited; Cyanamid Taiwan Corporation; Cyanamire S.p.A.; Cyaneka S.A.; Decorative Boards (Pty) Limited; Laminate Industries (Pty) Limited; Societe Anonyme Formica; Formica Espanola S.A.; Formica Plastics Pty. Limited; Lederle (Japan) Ltd.; Lederle (Nigeria) Limited; Mitsui-Cyanamid, Ltd.; Societe des Sutures Chirurgicales Robert & Carriere—Lederle; TDF Tiofine B.V.; YuBan-Cyanamid, Inc.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on October 5, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, Nos. 83-6041, 83-6053 (2d Cir. October 5, 1983), is reported at 719 F.2d 558. The district court rendered two decisions which are in issue, one granting intervention to MCI and Dart, and one terminating the consent judgment. These are reported at 556 F. Supp. 357 (S.D.N.Y. 1982), and 556 F. Supp. 361 (S.D.N.Y. 1983), respectively. The consent decree underlying this matter was entered on August 4, 1964 and may be found at 1964 Trade Cas. ¶ 71,166. All three opinions in the lower

courts, as well as the district court's 1983 judgment, the complaint, the 1964 decree and the Government's principal submission to the district court on the motion for termination are printed in the separately bound Appendix to this petition.

JURISDICTION

Cyanamid seeks review of the judgment of the United States Court of Appeals for the Second Circuit entered on October 5, 1983. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

The ruling below raises issues under Article III, Section 2, of the Constitution, which limits the judicial power of the federal courts to "cases" and "controversies," and under Article II, Sections 1 and 3, which entrusts the faithful execution of the laws to the Executive Branch of the Government.

STATEMENT OF THE CASE

On August 4, 1964, the United States and Cyanamid entered into a consent decree settling a Government civil antitrust action filed in 1960. Eighteen years later those parties jointly asked the district court to terminate the decree. The district court found the decree to be obsolete, anticompetitive and not in the public interest, and it therefore granted the parties' request. On an appeal brought by a competitor of Cyanamid that had intervened in the district court proceedings, the court of appeals reversed, holding that it was error for the district court to terminate the decree without first adjudicating whether Cyanamid's 1956 acquisition of Formica Corporation violates Section 7 of the Clayton Act, as alleged in the Government's original suit.

The Original Monopolization Suit Against Cyanamid

In its 1960 civil complaint (A-87-99) the Government charged that Cyanamid had obtained an illegal monopoly over the manufacture and sale of melamine[1] in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, and Section 7 of the Clayton Act, 15 U.S.C. § 18.

According to the complaint, Cyanamid was the sole seller of melamine in the United States at the time. It not only accounted for 100 percent of U.S. sales, but had 86 percent of all domestic production and 50 percent of production worldwide (A-92). The Government claimed that Cyanamid built and maintained its monopoly through its control over what was then the only commercially feasible melamine manufacturing process, one that used dicyandiamide ("dicy") as the raw material. (Cyanamid owned both the entire North American supply of dicy and all necessary patents for making melamine from dicy.) Cyanamid was further accused of dividing world markets with members of an international melamine cartel, thereby insulating the United States market from all foreign competition. Finally, the complaint alleged that Cyanamid's acquisition of the Formica Corporation, a major user of melamine, four years earlier violated Section 7 of the Clayton Act (A-95).

The 1964 Consent Decree

In August, 1964, before trial, Cyanamid and the Government settled the case by entry of the consent decree here in issue (A-68-86). Under that decree, Cyanamid agreed, among other things: to divest its principal melamine factory; to limit the amount of its own production of melamine; to make dicy available to all interested purchasers; to license its dicy-based technology; and to purchase annually from outside sources, with a preference to domestic companies, an amount of melamine equal to its previous

1. Melamine, a white crystalline powder, is used in the manufacture of numerous products, including plastic laminates, dinnerware and automotive parts.

year's usage for the manufacture of laminates in the United States (A-81).

Over the years, some of the decree provisions were fully complied with and others expired. Of those provisions that remained in effect as of 1982, all resistance to termination of the judgment focused on the mandatory purchase requirement set forth in Part XI of the decree.[2]

The Government's And Cyanamid's 1982 Request For Termination

On August 6, 1982, upon the completion of a fifteen-month investigation by the Department of Justice, the parties to the decree jointly asked the district court to terminate the remaining provisions. In explaining its reasons for supporting the motion, the Government told the district court that, "the circumstances under which the markets for melamine and melamine-containing products operate are completely different from those which obtained in the pre-complaint period."[3] Specifically, the dicy process, which was at the root of Cyanamid's alleged monopoly power, had become obsolete, thereby depriving Cyanamid of its former technological advantage over competitors. Also over the years, new competitors, including a number of highly efficient foreign suppliers, had entered the domestic market. As a result, by 1981 Cyanamid's market share had fallen from the 100 percent alleged in the complaint to a mere 11.7 percent. MCI (successor to one of the post-1964 entrants) had become the largest domestic seller with 49.2 percent of sales, while foreign suppliers accounted for the remaining 38.1 percent of the market.[4] The Government concluded, based upon these and other

2. The provisions of the decree and their status as of 1982 are summarized in the district court opinion at A-28-31.

3. Memorandum Of The United States In Response To Motion Of American Cyanamid Company To Terminate The Final Judgment Herein, filed August 6, 1982 at A-59. That document is the official statement by the Justice Department of its reasons for seeking to end the melamine decree and is reprinted in full at A-55-67.

4. Market share figures presented in the various submissions to the district court were summarized in the Response Of American Cyanamid

developments unanticipated in 1964, that the decree had become anticompetitive under present market conditions and should be terminated.

Three competitors, including MCI, opposed termination, although they advanced inconsistent theories as to the likely results of terminating the decree.[5] Two of those companies obtained leave to intervene, over the objection of Cyanamid and the Government, while the third participated as amicus curiae. The court received factual and legal submissions from the parties, the intervenors and amicus and all presented their arguments at a hearing held October 27, 1982. In an opinion issued January 10, 1983, the court vacated the decree.

The Decision Of The District Court

In considering the motion, the district court[6] recognized that the Department of Justice has "broad discretion" in controlling the course of its antitrust litigation, including consent decree matters, and that, "[a]bsent abuse of discretion, the Government's conclusion that a decree should be vacated should be given great weight" (A-39). Here, the court found, the Department had carefully examined the relevant facts and the opponents' contentions and had otherwise discharged its public interest responsibilities fully and conscientiously (A-39).

Even so, the district court declined to "rubber stamp" the Department's recommendation and made its own assessment of the likely effects of ending the decree (A-39). Based on the record before it, the court agreed that "[s]ince the Consent

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Company To Comments Opposing Termination Of The Final Judgment, filed October 25, 1982 at 14.

5. As summarized in the opinion of the district court, MCI argued that it was dependent on continuing subsidy from Cyanamid, and might leave the market absent the decree. The other two opponents of termination, makers of melamine products, argued that termination of the decree would give *MCI* monopoly power. (*See* A-34-35).

6. The matter was decided by the Honorable Charles L. Brieant of the Southern District of New York, the district judge who had administered the decree for the previous ten years and personally presided over several prior proceedings concerning its meaning and application (A-27-28).

Decree was entered, profound and complex changes have taken place in the melamine production industry" (A-31-32). Further, the court determined that the primary continuing effect of the decree was simply to force Cyanamid to subsidize MCI (A-32-34). Ending that subsidy, the court concluded, could be expected to enhance competition by causing MCI to compete more vigorously (A-39-40). Finally, the court found that aggressive competition from numerous importers assured ample supplies to all melamine users (A-38, A-40). Thus the court found no competitive justification for retaining the decree, holding:

> Where, as here, the conditions which the decree was designed to remedy no longer exist, the decree should be terminated, especially where it operates against the competitive designs of antitrust legislation.

(A-41, citations omitted).

The Decision Of The Second Circuit

In reversing the district court's decision, the court of appeals did not address the basic finding that, as a factual matter, the decree now "operates against the competitive designs" of the antitrust laws. Instead, because the single provision fastened upon by the intervenors related to the Clayton Act Section 7 claim in the Government's 1960 complaint, the Second Circuit treated the appeal as though it were from a litigated judgment on the merits in a Section 7 action. It held that the trial court had erred in vacating the consent decree without properly adjudicating whether a "Section 7 violation presently exists," based upon "the factors for analyzing the legality of a vertical merger set forth by *Brown Shoe*,[7] *Fruehauf*,[8] and other applicable cases" (A-21). On remand, the district court was directed to "determine the relevant markets and the market shares of the acquiring and acquired firms' shares in those markets" (A-18), and to apply what the Second Circuit called "the standard framework for analysis of the legality of a vertical merger" (A-19).

7. *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).
8. *Fruehauf Corp.* v. *FTC*, 603 F.2d 345 (2d Cir. 1979).

In part, the court of appeals found the Section 7 standard to be consistent with certain language in Part XI of the decree—a proviso for ending the purchase requirement upon a showing by Cyanamid that competition would not be injured.[9] In the main, however, the Second Circuit went out of its way to make clear that district courts should apply a substantive liability test whenever the parties agree that a decree should be terminated. The court recognized that in refusing to permit the parties to vacate the decree of their own accord, it was rejecting normal contract principles for consent decree administration, but nonetheless held that:

> it is appropriate for the court to look beyond the words of the decree itself in situations such as this, where the parties jointly seek a modification of the decree.

A-15-16. In short, it was *because* the Government and Cyanamid were in agreement that the court thought it proper to insist upon adjudication of the issues raised in the complaint as a precondition to vacating the decree.

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9. To the extent the court of appeals attempted to rest its decision on that proviso, it rejected the understanding shared by both the parties who drafted the decree and the district court charged with administering it as to what the language in question means. Part XI states in part:

> at any time after ten (10) years from [November 1964], Cyanamid may petition to this Court to be relieved from this provision, such relief to be granted upon a showing by Cyanamid to the satisfaction of this Court that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly . . ..

A-81. The parties explained that they had inserted this language only to permit termination of the purchase requirement, on Cyanamid's *unilateral* application, upon a lesser showing than would otherwise be required under *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). They made clear, and the district court agreed, that they did not intend this language to make it more difficult for the parties jointly to set aside the entire decree. (*See* A-34).

REASONS WHY THE WRIT SHOULD BE GRANTED

Introduction

This petition presents an extremely important federal question. The significance of the consent decree as a law enforcement tool was recognized by this Court fifty years ago in its landmark *Swift*[10] decision. Since then, the Court has decided a number of cases that provide the basic guidelines for the interpretation and enforcement of consent decrees by the district courts. Virtually all of the rules governing consent decree administration have come directly from this Court. Many of the leading consent decree decisions have been antitrust cases, but the principles articulated in those cases have been applied to decrees in all areas,[11] as will the holding of the Second Circuit below, if allowed to stand.

In *Swift*, the Court addressed the question whether, and by what standard, a defendant may unilaterally seek relief from a consent decree. Subsequently, the Court established rules to be applied where the Government seeks to modify a decree without the defendant's consent[12] and, in a series of decisions, for resolving disputes between the parties as to the meaning or scope of a consent decree.[13]

The question presented here—the standard to be applied in perhaps the most common situation in the district courts, *i.e.*, where the parties are in agreement that relief from the decree is

10. *United States* v. *Swift & Co.*, 286 U.S. 106 (1932).

11. *See, e.g., SEC* v. *Clifton*, 700 F.2d 744 (D.C. Cir. 1983) (securities law); *White* v. *Roughton*, 689 F.2d 118 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 1524 (1983) (civil rights law); *Environmental Defense Fund* v. *Costle*, 636 F.2d 1229 (D.C. Cir. 1980) (environmental law); *Philadelphia Welfare Rights Org.* v. *Shapp*, 602 F.2d 1114 (3d Cir. 1979), *cert. denied sub nom., Thornburgh* v. *Philadelphia Welfare Rights Org.*, 444 U.S. 1026 (1980) (social security and welfare law); *United States Steel Corp.* v. *Fraternal Ass'n of Steel Haulers*, 601 F.2d 1269 (3d Cir. 1979) (labor law).

12. *Ford Motor Co.* v. *United States*, 335 U.S. 303 (1948); *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942).

13. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975); *United States* v. *Armour & Co.*, 402 U.S. 673 (1971); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); *Hughes* v. *United States*, 342 U.S. 353 (1952).

needed—has not yet been addressed by this Court. The purported solution offered by the Second Circuit, however, drastically changes long-standing principles of consent decree administration in a way that cannot be reconciled with this Court's prior decisions.

I

The Decision Below Affects All Consent Decrees And Prejudices The Rights Of All Consent Decree Parties.

This Court needs no reminder that the consent decree has become a widely-used law enforcement mechanism, not only in the antitrust field, but in the law of taxation, land and natural resource management, civil rights and securities regulation, among others. Thousands of decrees are now on the dockets of the federal courts, and, while statistics are not available for every law enforcement agency, it is well known that nearly ninety percent of all judgments obtained over the years by the Antitrust Division of the Department of Justice were entered on consent. The same is true for actions brought by the Securities and Exchange Commission.[14] Any change in the way consent decrees are to be administered will necessarily have far ranging effects.

A. The Decision Fundamentally Changes Prior Consent Decree Practice.

Over the years, the federal courts have processed and granted "literally hundreds" (A-63 n.1) of joint requests for modification or termination of antitrust consent decrees. The Second Circuit's ruling, directing the district courts to adjudicate liability issues as in a litigated case, sharply conflicts with prior practice in such matters, which recognized that the consensual nature of the

14. For securities cases see *SEC* v. *Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983). For antitrust consent decrees see 949 ANTITRUST & TRADE REG. REP. (BNA) F1, F2, F8 (January 31, 1980). In the antitrust area alone, it has been stated that there are approximately 1,300 Government consent decrees currently in force. Statement of William F. Baxter, Assistant Attorney General, Antitrust Division, Before the Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, United States House of Representatives, March 10, 1983 at 15.

proceedings made adjudication inappropriate. Just the day before the Second Circuit's decision came down, another court of appeals ruled that, because the district court's role in consent decrees is "fundamentally different from its duty in trying a case on the merits," it would be improper to condition modification of a decree on "detailed findings that the Act had been violated in various ways." *Citizens For A Better Environment* v. *Gorsuch*, 718 F.2d 1117, 1125 (D.C. Cir. 1983). That court stressed that, "it is precisely the desire to avoid a protracted examination of the parties' legal rights which underlies consent decrees." *Id.* at 1126.

No different approach has ever been proposed for consent decrees in the antitrust area, and Congress specifically rejected any such notion when it imposed procedures for approving new decrees under the Antitrust Procedures and Penalties Act.[15] The legislative history of that Act makes clear that the courts are not to engage in substantive proceedings that are inconsistent with the nature and purpose of the consent decree as a settlement device.[16] Cases under the APPA have limited the courts' public interest inquiry accordingly:

> The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. . . . The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." . . . More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

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15. 15 U.S.C. §§ 16(b-h) (1982) (hereinafter referred to as the "APPA").

16. *See* H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974); S. Rep. No. 298, 93d Cong., 1st Sess. 6-7 (1973).

United States v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981) (citations omitted).[17]

Where, as here, consent decree parties have jointly sought modification or termination of an existing decree, the courts have previously taken an approach similar to the one followed under the APPA and by the district court in this case: they have limited their role to ascertaining that there was a rational basis for the parties' request, and, in Government cases, that the Department of Justice had fulfilled its responsibility to represent the public in good faith.[18]

Although the Second Circuit acknowledged that the APPA "provides useful guidance to the courts in deciding how modification procedures should be addressed" (A-16 n.7), it ignored both the APPA public interest standard and cases applying a like standard to joint requests for modification or termination. It approached the question from an entirely different direction, focusing exclusively on issues of substantive liability and creating a greatly enlarged and totally unprecedented role for the courts.

Legal commentators have already begun to recognize the significance of this departure:

> The Second Circuit's reversal and remand to the lower court to reconsider the decree termination in light of

17. *Accord, e.g., United States* v. *Agri-Mark, Inc.*, 512 F. Supp. 737 (D. Vt. 1981) (court function "not to determine whether this is best possible settlement"); *United States* v. *Carrols Dev. Corp.*, 454 F. Supp. 1215 (N.D.N.Y. 1978) (not court's duty to obtain "best possible settlement"); *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127 (C.D. Cal. 1978) (parties must show only "an acceptable result"); *United States* v. *Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975) ("Court cannot provide the best of all possible worlds"); *United States* v. *Associated Milk Producers*, 394 F. Supp. 29 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113 (8th Cir.), *cert. denied sub. nom., National Farmers Org.* v. *United States*, 429 U.S. 940 (1976) (court must "accommodate a balancing of interests").

18. *See, e.g., United States* v. *American Brands, Inc.*, 1983-1 Trade Cas. ¶ 65,276 (S.D.N.Y. 1983); *United States* v. *General Motors Corp.*, 1983-2 Trade Cas. ¶ 65,614 (N.D. Ill. 1983); *United States* v. *Owens-Corning Fiberglass Corp.*, 1983-1 Trade Cas. ¶ 65,247 (N.D. Ohio, 1982); *United States* v. *Swift & Co.*, 1983-1 Trade Cas. ¶ 65,250 (N.D. Ill. 1980); *United States* v. *General Electric Co.*, 1977-2 Trade Cas. ¶ 61,659 (E.D. Pa. 1977); *United States* v. *Swift & Co.*, 1975-1 Trade Cas. ¶ 60,201 (N.D. Ill. 1975).

> existing legal precedent carries additional significance because it establishes a strong judicial role in reviewing petitions to terminate consent decrees. . . . [T]he district court saw its function as determining only whether [the] public interest was served. *The Second Circuit envisioned a much greater judicial responsibility: consideration of whether the decree's purpose, derived from the language of the decree, the complaint that precipitated the decree, and the statute that gave rise to the complaint, had been fulfilled.* After *American Cyanamid*, this determination must be made by the court independent of government assertions and assurances.[19]

In the remaining portions of this petition we show that this new approach is grossly unfair to consent decree defendants, totally unsuitable as a basis for handling this or any other consent decree question and flatly contrary to Supreme Court precedent.

B. The Ruling Of The Second Circuit Undercuts The Advantages Of Consent Decree Settlements.

In insisting upon formal adjudication of liability issues, the Second Circuit ruling eliminates one of the traditional advantages of consent decree settlement: the flexibility, where the other party agrees, to adjust or eliminate the terms of the settlement agreement as conditions change. The importance of that flexibility is established by the hundreds of decrees that have been changed or terminated on consent over the years, including many landmark antitrust decrees.[20] The melamine decree itself was modified on three prior occasions, with Government consent, to accommodate market and technological developments (A-27-28). Reducing this flexibility, as the adjudicative standard imposed by the Second Circuit obviously does, can only increase the burdens on the Government and the courts in dealing with

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19. Axinn and Stoll, *U.S. v. American Cyanamid—Consent Decree Modification Standards*, 190 N.Y.L.J. 93 (1983) 1, col. 1, at 30, col. 3 (emphasis added). For another commentary predicting that the Second Circuit's decision will have a "significant impact" on consent decree modification standards, see Nelson, *Court Complicates DOJ Modification of Antitrust Decree*, Legal Times, October 31, 1983, 1, col. 2.

20. For a partial survey of the large number of modifications and terminations of antitrust consent decrees, see 4 TRADE REG. REP. (CCH) ¶ 45,070 (1983).

antiquated decrees, and discourage future defendants from entering into long-term settlement obligations.

That the approach of the Second Circuit also inflicts real injustice on current consent decree defendants is well illustrated by Cyanamid's experience in this case. When Cyanamid, after operating for some years under a decree that had become obsolete and punitive, decided to seek an end to its strictures, it followed normal procedures and took its case first to the Department of Justice rather than moving for relief directly in court. The Department's Antitrust Division investigated the matter for fifteen months, during which it analyzed industry changes, canvassed the views of many other firms, and made repeated requests for information and documentation from Cyanamid before agreeing to support termination of the decree.[21]

Despite this record, the court of appeals has now held that the investigatory work and good faith recommendation of the Department of Justice—not to mention the substantial efforts already invested by the district judge—are irrelevant. It has remanded for Cyanamid to litigate, in effect, a private Section 7 claim maintained by its largest competitor as the sole avenue of release from the Government decree. It is hard to imagine a more prejudicial or unexpected transformation of the settlement contract than for the court to strip the Government of control of its side of the bargain and allow a non-party competitor to become the enforcer of the decree. Unless this Court intervenes, every consent decree defendant faces the risk that someday its settlement with the Government will be turned by unforeseen adversaries into a weapon of private commercial advantage.

21. The Government's agreement was conditioned upon Cyanamid's dedicating its remaining melamine-related patents to the public, which Cyanamid has done. In addition, during the two-and-one-half years since Cyanamid first approached the Government, Cyanamid has spent many millions of dollars complying with the decree by purchasing vast quantities of unwanted and unneeded melamine from MCI. By the time Judge Brieant rendered his decision, just the storage costs for that excess inventory had reached $40,000 per month. Affidavit of Robert P. Kreahling, sworn to December 20, 1982, ¶¶ 10, 20. (*See* A-43).

II

The Parties' Agreement To End The Decree Should Limit, Not Expand, The Scope Of Judicial Inquiry.

This Court has previously observed that, "a decree, which appears by the record to have been rendered by consent, is always affirmed, *without considering the merits of the cause.*"[22] It therefore makes no sense at all to hold, as the Second Circuit has, that when the parties seek to end a decree by consent, the court should then proceed with a plenary adjudication of the merits of the original complaint. We show here that both the Constitution and this Court's prior consent decree rulings preclude such a result.

A. There Is No Genuine Case Or Controversy For The Lower Court To Decide.

The ruling of the Second Circuit, that a consent decree cannot be dissolved at the request of its signatories until the district court determines whether a violation of law "presently exists," directly contravenes the Constitutional limitation on the judicial power to adjudication of "the legal rights of litigants in actual controversies." *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 471 (1982) (quoting *Liverpool S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885)); U.S. CONST., art. III, § 2, cl. 1.

The parties to the melamine consent decree are not in dispute with respect to, and do not wish to litigate, the issues raised by the Government's 1960 complaint. They settled that case almost twenty years ago, "without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting evidence or an admission by either party hereto with respect to any such issue . . ." (A-68). The sole matter that has been presented to the courts is the parties' request, also by agreement, that the injunction to which they consented in 1964 come to an

22. *Swift & Co.* v. *United States*, 276 U.S. 311, 324 (1928) (quoting *Nashville, Chattanooga & St. Louis Ry.* v. *United States*, 113 U.S. 261, 266 (1885)) (emphasis added).

end. Thus, in directing the district court to rule upon antitrust issues which are not in controversy between the parties, the court of appeals has ordered a judicial inquisition that is clearly beyond the authority of Article III courts.

The willingness of intervenors to oppose termination of the decree does not remedy the case and controversy problem, for two reasons. First, "it is axiomatic that 'intervention will not be permitted to breathe life into a 'non-existent' lawsuit.'" *McClune* v. *Shamah*, 593 F.2d 482, 486 (3rd Cir. 1979) (quoting *Fuller* v. *Volk*, 351 F.2d 323, 328 (3rd Cir. 1965)). *Accord United States ex. rel. Texas Portland Cement Co.* v. *McCord*, 233 U.S. 157 (1914). Accordingly, a settlement between the original parties has been held to terminate the action and bar subsequent intervention. *Horn* v. *Eltra Corp.*, 686 F.2d 439 (6th Cir. 1982) (no intervention after settlement); *Non-Commissioned Officers Ass'n* v. *Army Times Publishing Co.*, 637 F.2d 372, *mod. on other grounds.*, 650 F.2d 83 (5th Cir. 1981) (no intervention after consent decree entered); *Black* v. *Central Motor Lines, Inc.*, 500 F.2d 407 (4th Cir. 1974) (consent judgment terminates the action for intervention purposes). Therefore, since the Clayton Act issues raised by the Government's 1960 complaint were settled in 1964, intervenors cannot now resurrect them.

A second reason why the claims of intervenors do not cure the defect in the Second Circuit's remand order is the rule that strangers to a consent decree lack standing to enforce it:

> [A] well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it . . . ."

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723, 750 (1975).[23] Here, the only issue is whether the 1964 decree should continue to be enforced, and the only voices urging continued enforcement are those of non-parties to the settlement.

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23. Citing *United States* v. *Armour & Co.*, 402 U.S. 673 (1971), and *Buckeye Coal & Ry.* v. *Hocking Valley Ry.*, 269 U.S. 42 (1925).

The Second Circuit held that this "rule against enforcement by third parties does not apply" because MCI had been allowed to intervene (A-15 n.6). That, of course, simply begs the question. The court cannot confer standing, where it otherwise would not exist, simply by granting a motion to intervene. Article III requires an active dispute between adversary parties who have the requisite standing to sue. *See generally Flast* v. *Cohen*, 392 U.S. 83 (1968). Thus, the Second Circuit's remand order commands the very type of proceeding which the rule referred to in the *Blue Chip Stamps* case forbids: one in which persons not parties to a decree are given a forum to perpetuate and enforce a public consent decree to further their private, commercial interests.[24]

B. The Judicial Role Envisioned By The Second Circuit Conflicts With The Contractual Nature Of Consent Decrees.

Because the Second Circuit's approach gives no weight to the agreement of the parties that their settlement should come to an end, it directly conflicts with the longstanding rule that consent decrees should be treated basically as contracts, "without reference" to the legal theories that prompted the complaint. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 237 (1975). *Accord United States* v. *Armour & Co.*, 402 U.S. 673 (1971); *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959); *Hughes* v. *United States*, 342 U.S. 353 (1952). The holding below cannot be squared with what this Court has termed the

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24. That result is also irreconcilable with the rule that private party intervention is improper in Government antitrust cases. *See, e.g., Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *United States* v. *Associated Milk Producers*, 543 F.2d 113 (8th Cir.), *cert. denied sub nom., National Farmers' Org.* v. *United States*, 429 U.S. 940 (1976); *United States* v. *Hartford-Empire Co.*, 573 F.2d 1 (6th Cir. 1978). The statutory scheme of the antitrust laws envisions that private parties will pursue any claims they may have exclusively in private litigation, *Sam Fox Publishing Co.* v. *United States, supra*, 366 U.S. at 689, and that "the United States . . . must alone speak for the public interest" in public antitrust litigation. *Buckeye Coal & Ry.* v. *Hocking Valley Ry., supra*, 269 U.S. at 49.

"basic import"[25] of those precedents, since it requires the district court to maintain a decree which no longer has the parties' consent solely on the basis of its underlying "purpose," as inferred from legal theories in a twenty-four-year-old complaint that were never proved applicable to the case at bar.

The Second Circuit acknowledged *Armour*'s holding that the decree itself "cannot be said to have a purpose" (A-12, quoting 402 U.S. at 681), and is only the "embodiment of the intent of the parties" (A-12), but sought to limit that rule to situations where the parties are in dispute:

> In each of those cases, a danger existed that the defendant might be penalized for conduct not prohibited by the decree. . . . Here, that danger is not present since the government is not claiming that Cyanamid is engaging in conduct in violation of the decree. Rather, the government and Cyanamid are in agreement as to the termination of the decree.
>
> When the facts of a given case do not lend themselves to easy resolution by viewing the decree as akin to a contract, courts have turned to the quasi-judicial nature of consent decrees and have resorted to equitable considerations.

A-13. Stated otherwise, the Second Circuit found this case not susceptible to "easy resolution" on a contractual basis precisely because the parties are in agreement. But that reasoning is transparently fallacious, and the court's attempt to support its ruling on the ground that a consent decree is "quasi-judicial" and in part a "judicial act" does not withstand scrutiny.

The "judicial act" theory, explicated by Justice Cardozo in the *Swift*[26] opinion, only confirmed the power of the court to modify a consent decree in the face of changed circumstances. Nothing in *Swift* (or any subsequent decision) suggests that the court can or should enforce a decree which both parties believe has outlived its

25. *United States* v. *ITT Continental Baking Co.*, *supra*, 420 U.S. at 236.

26. *United States* v. *Swift & Co.*, 286 U.S. 106 (1932).

usefulness. In fact, *Swift* itself squarely rejects the Second Circuit's unspoken premise, that the parties' consent, once given, may not be withdrawn:

> The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be.

United States v. *Swift & Co.*, *supra*, 286 U.S. at 115[27].

If revision is possible even where one party objects, it should, if anything, be more freely available when both parties agree. Under the Second Circuit's analysis, however, when the parties agree their wishes become entirely irrelevant, and the decree becomes not "quasi-judicial" but exclusively judicial. This Court should grant review to correct this misapplication of its prior decisions.

C. In a Government Case, Failure To Accord Proper Weight To The Parties' Agreement Intrudes On The Constitutional Authority Of The Executive Branch.

Cyanamid does not purport to speak for the interests of the Department of Justice. However, as explained above (pp.12-13), Cyanamid relied upon that agency's authority in proceeding as it did, and in dedicating its patents as a condition for release from the decree. The failure of the Second Circuit to accord any weight to the Government's recommendation—and it is plain from the type of proceedings required on remand that it did not—is another clear error which warrants this Court's attention.

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27. The district court emphasized this principle, stating:

> It is of course clear that an antitrust consent decree should only endure so long as, and contain only such remedial measures necessary to ensure competition. *See United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States* v. *National Lead Co.*, 332 U.S. 319 (1947). An antitrust remedy is designed to restore competition not to punish a defendant. *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).
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> A-41.

As stated in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), it is not "the province of the court . . . to inquire how the executive, or executive officers, perform duties in which they have a discretion." This Court has long reconized that the prosecutorial discretion of the Executive Branch to control its cases, and specifically to dismiss them, continues even after judgment has been entered. *The Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868). These principles have always been applied to antitrust consent decree matters, affording the Department of Justice a degree of discretion that is completely at odds with the Second Circuit approach.[28] By making the termination of a consent decree turn on the application of substantive liability rules, the decision below denies the Department (as well as the district court) any discretion at all.

We submit that whether a consent judgment deserves continued enforcement by the Department of Justice is intrinsically a question relating to the "execution of the laws"—even more so than the entry of a new decree, which three Justices of this Court recently characterized as a matter "clearly for nonjudicial discretion." *Maryland* v. *United States*, 103 S.Ct. 1240, 1243 (1983) (Rehnquist, J., joined by Burger, C.J. and White, J. dissenting from summary affirmance of a new consent decree). *See* U.S. CONST., art. II. Accordingly, the Department's good faith determination, that further enforcement of the decree is inappropriate, should have been respected.

28. *E.g.*, *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961) (court should not question Government's judgment absent "bad faith or malfeasance"); *Swift & Co.* v. *United States*, 276 U.S. 311, 332 (1928) (Attorney General's discretion over consent decrees "includes the power to make erroneous decisions as well as correct ones").

CONCLUSION

For the reasons stated herein, American Cyanamid Company respectfully requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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